No. 78-982

In the Supreme Court of the United States

OCTOBER TERM, 1978

SPECTROFUGE CORPORATION,

Petitioner,

vs.

BECKMAN INSTRUMENTS, INC.,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 575 F.2d 256; App. 1-93.[1] The order denying the petition for rehearing and rehearing en banc of September 27, 1978, is not yet reported.

JURISDICTION

The jurisdictional requisites to consider the Petition are set forth therein.

[1] References to the Court of Appeals opinion printed in the Appendix to the Petition shall be "App. .....".

STATUTES INVOLVED

A. 15 U.S.C. §1 provides, in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, is declared to be illegal."

B. 15 U.S.C. §2 provides, in pertinent part:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . ."

QUESTION PRESENTED

Whether the petitioner's total failure of proof of any antitrust violation renders certiorari inappropriate either to:

A. Review the settled standards for determination of attempt to monopolize under Section 2 of the Sherman Act, or;

B. Review the Court of Appeals' holding that respondent's replacement drive proration policy was unilateral rather than concerted action, particularly in view of the unchallenged holding of the Court of Appeals that the policy was reasonable under Section 1 of the Sherman Act.

STATEMENT OF THE CASE

Petitioner, Spectrofuge Corporation, was organized in May, 1972, by two former service employees of Respondent, Beckman Instruments, Inc. Spectrofuge engages primarily in the business of providing maintenance and repair service for laboratory and industrial instruments. A substantial portion of its service work has been devoted to one instrument, the ultracentrifuge, and in particular, the

ultracentrifuge manufactured by Beckman.[2] Beckman manufactures and provides service, incidental to the sale, of a wide range of scientific instruments, as well as electronic components and fine chemicals. Spectrofuge solicited service business from institutions in several states, and expanded by hiring Beckman employees in areas where it obtained business.

Proceedings Below

In 1973, Spectrofuge filed this action against Beckman, based, *inter alia*, on Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1 and 2) and common law unfair competition. Beckman counterclaimed against Spectrofuge and its principals based upon Spectrofuge's solicitation of service personnel, common law unfair competition, as well as misappropriation of Beckman's confidential information.

After trial, judgment was entered on a jury verdict for Spectrofuge on its antitrust and common law claims, and against Beckman on its counterclaims. Beckman's motion for judgment n.o.v. was partially granted by the trial court as a "remittitur" based upon insufficient evidence; however, the trial court denied the remainder of Beckman's post trial motions, as well as Spectrofuge's motion for an injunction. Both parties appealed.

The Court of Appeals for the Fifth Circuit, based upon a meticulously detailed, exhaustive review of the entire record, concluded that Spectrofuge ". . . proved no anti-

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[2] An ultracentrifuge is a scientific instrument in which samples of the material to be analyzed are spun at an ultrahigh rate of speed (40,000-70,000 r.p.m.) until the material separates into its components.

trust violations." (575 F.2d at 290; App. 85). The Court expressed the ". . . conviction that the antitrust claim bordered on the frivolous. . . ." (575 F.2d at 290; App. 85-86). The Court held that the antitrust claims should not have been submitted to the jury, and that Beckman's motions for directed verdict and for judgment n.o.v. as to the antitrust claims should have been granted. (575 F.2d at 286, 290; App. 76, 85). The Court affirmed the remainder of the judgment.

ARGUMENT

The Court of Appeals Correctly Determined that No Antitrust Violation had Occurred Based Upon The Limited Facts and Failures of Proof of the Spectrofuge Case.

A. Under the facts presented by the Petitioner, certiorari is inappropriate to review the settled standards for determination of an alleged attempt to monopolize under Section 2 of the Sherman Act.

The Circuit Court of Appeals below rendered an elaborately detailed opinion based upon its careful and conscientious review of the entire record. The Court reversed a general jury verdict. Its conclusion was that the Spectrofuge antitrust claim was a "meritless matter," 575 F.2d at 290, n. 101; App. 86, n. 101). Reversing a jury verdict is never considered lightly and the Circuit Court outlined in painstaking detail the total lack of proof and of merit of the Spectrofuge antitrust claims.

With respect to the Section 2 claims the Circuit Court found:

a) ". . . no evidence as to Beckman's comparative strength in the scientific instruments market as a whole." (575 F.2d at 283; App. 67);

b) ". . . no evidence regarding Beckman's strength if reasonably interchangeable substitutes for UCs were considered as part of the submarket." (575 F.2d at 283; App. 67-68);

c) ". . . nothing in the record to indicate that the industry or the public recognizes servicing of Beckman UCs as a separate economic entity." (575 F.2d at 283; App. 69);

d) ". . . nothing in the record to indicate that UCs—as opposed to other instruments—were sold to distinct customers." (575 F.2d at 283; App. 69);

e) ". . . even assuming the market could be confined to servicing Beckman instruments or Beckman UCs, Spectrofuge failed to prove that Beckman enjoyed monopoly power in any possible geographical market." (575 F.2d at 284; App. 71);

f) ". . . no evidence from which the jury could begin to measure Beckman's power to control prices or to exclude competition in the relevant market defined by Spectrofuge." (575 F.2d at 286; App. 75);

g) ". . . as to the attempt claim, there was nothing to show a dangerous probability of successfully monopolizing either market. Indeed, as to the attempted monopolization of a UC servicing submarket in the Atlanta district, what little evidence there was showed that Beckman had no possibility of success and that if viewed properly with respect to geographic market considerations . . . Spectrofuge may well have enjoyed a superior position." (575 F.2d at 286; App. 75, 76).

With respect to the Section 1 claim the Circuit Court found:

> ". . . the record is totally barren of any contract, combination or agreement, express or implied, between Beckman and Beckman instrument owners to—as the plaintiff would have it—'put Spectrofuge out of business.' These policies were established unilaterally, and even with Procrustean efforts, there is no way to connect them with Beckman instrument or UC customers within the meaning of §1." (575 F.2d at 288; App. 80, 81).

In the teeth of this thorough review and rejection of the Spectrofuge antitrust claims, the Petitioner asserts that this case provides an appropriate vehicle for certiorari in order to provide this Court with an opportunity to reconsider a settled basic tenet of antitrust law, virtually as old as the Sherman Act itself. As articulated by the Circuit Court below, the offense of attempted monopolization "has two elements: (1) specific intent to accomplish the illegal result; and (2) a dangerous probability that the attempt will be successful." (575 F.2d at 276; App. 51). The dangerous probability of success must be measured in terms of a defined relevant market. (575 F.2d at 276; App. 52).

The dangerous probability requirement with respect to attempts to monopolize had its origin in an opinion of Mr. Justice Holmes, in *Swift and Company* v. *United States*, 196 U.S. 375, 396 (1905):

> "Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. . . . But when that intent and the consequent dangerous probability exist, this statute, like many others and like the common-law in some cases, directs itself against that dangerous probability as well as the completed result."

This Court has rejected the attempts of anti-trust plaintiffs to dispense with the requirement of market definition in §2 cases, *e.g., Walker Process Equipment, Inc.* v. *Food Machinery and Chemical Corp.*, 382 U.S. 172, 177 (1965), where the Court ruled that the attempted enforcement of a fraudulently procured patent could give rise to a §2 claim but held, nevertheless, that:

> "To establish monopolization or attempt to monopolize a part of trade or commerce under §2 of the Sherman Act, it would then be necessary to appraise the exclusionary power of the illegal patent claim in terms of the relevant market for the product involved. Without a definition of that market there is no way to measure Food Machinery's ability to lessen or destroy competition."

Petitioner asserts that the requirement of proof of a dangerous probability of success in a relevant market "if left standing, will serve to emasculate the effectiveness of the antitrust laws." (Pet., p. 4). This alleged lack of vitality has not been evident to the federal courts which have addressed this issue.

Petitioner claims support for its view in a 2 to 1 opinion by a panel of the Ninth Circuit Court of Appeals, *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459 (9th Cir. 1964), *cert. den.*, 377 U.S. 993 (1964). This anomalous opinion, said to be a "primary source of confusion" within the Ninth Circuit, *General Communications Engineering* v. *Motorola Communications and Electronics, Inc.*, 421 F. Supp. 274, 285-86 (N.D. Cal. 1976), has been essentially limited to its facts by subsequent decisions of the Ninth Circuit.[3]

While the law within the Ninth Circuit might be said to be clouded, *all* of the nine other circuits which have directly considered this issue are in accord with the Fifth Circuit position as to the elements of an attempt to monopolize, as expressed in its opinion below.[4]

[3] See, *e.g.*, *Cornwell Quality Tools Co.* v. *C.T.S. Company*, 446 F.2d 825 (9th Cir. 1971), *cert. den.*, 404 U.S. 1049 (1972); *Bushie* v. *Stenocord*, 460 F.2d 116 (9th Cir. 1972); *Hallmark Industry* v. *Reynolds Metals Co.*, 489 F.2d 8 (9th Cir. 1973); *Janich Bros., Inc.* v. *American Distilling Company*, 570 F.2d 848 (9th Cir. 1977); *ALW, Inc.* v. *United Airlines, Inc.*, 510 F.2d 52, 57 (9th Cir. 1975):

> "Thus, the evidence presented to the district court did not support a cause of action under Section 2: No monopoly power or dangerous probability thereof was shown to exist within any relevant market, and no monopolistic intent is indicated."

[4] See, *e.g.*, *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 508 F.2d 547, 550 (1st Cir. 1974), *cert. den.*, 421 U.S. 1004 (1975) ("To be successful, an attempt case must establish both an intent to monopolize and a dangerous probability of successful monopolization . . . these elements take on meaning only with reference to an actual or potential exercise of power, which in turn must be assessed in the context of a relevant market."); *FLM Collision Parts, Inc.* v. *Ford Motor Co.*, 543 F.2d 1019, 1030 (2nd Cir. 1976), *cert. den.*, 429 U.S. 1097 (1977) ("Where the defendant is charged with attempt to monopolize, a 'dangerous probability' of success must be shown."); *Coleman Motor Company* v. *Chrysler Corporation*, 525 F.2d 1338, 1348 (3rd Cir. 1975) (". . . the actor (must) have sufficient market power to come dangerously close to success . . ."); *McElhenney Co.* v. *Western Auto Supply*, 269 F.2d 332, 339 (4th Cir. 1959) ("This count of the complaint thus is bereft of any averment of monopoly power in any defined market, or an intent to monopolize coupled with a dangerous possibility that a monopoly could be effectuated . . ."); *Alles Corp.* v. *Senco Products, Inc.*, 329 F.2d 567 (6th Cir. 1964) (Quoting *Swift*); *Bernard Food Industries, Inc.* v. *Dietene Company*, 415 F.2d 1279, 1284 (7th Cir. 1969), *cert. den.*, 397 U.S. 912 (1970) ("Absent also is any evidentiary basis for holding that defendant possessed the power to monopolize. Moreover, there is no proof of what constituted the relevant market."); *United States* v. *Empire Gas Corporation*, 537 F.2d 296, 302 (8th Cir. 1976), *cert. den.*, 427 U.S. 1122 (1977) (". . . proof of dangerous probability of success of an attempt to monopolize must include a showing of the relevant market within which that probability occurred."); *E. J. Delaney Corp.* v. *Bonne Bell, Inc.*, 525 F.2d 296, 306 (10th Cir. 1975), *cert. den.*, 425 U.S. 907 (1976) ("Since the 'dangerous probability' is that of attaining a successful control of prices in the market, and the power to thus exclude competition therefrom, an evaluation of this probability by the jury necessarily requires that it have the facts as to the *market being considered, and the power of the defendant in it.*") (Emphasis in original)

Contrary to the assertion in the Petition, an apparent aberration within the Ninth Circuit on this issue provides no adequate basis to warrant certiorari by this Court in this case. Moreover, the logic and soundness of the principle are clear. Absent the elements of proof of dangerous probability of success in a relevant market, it is not possible to determine whether the conduct attempted would in fact be proscribed if the attempt were successful. This concern was expressed in *Acme Precision Products, Inc.* v. *American Alloys Corp.*, 484 F.2d 1237, 1240 (8th Cir. 1973), as the Court quoted *Diamond International Corp.* v. *Walterhoefer*, 289 F.Supp. 550 (D.Md. 1968) with approval:

> " 'It seems to this Court clear, both on authority and logic, that when a charge is made of attempt to monopolize, the first question would be—'to monopolize what?' The answer would seem to be 'the relevant market, toward the monopolization of which the attempt was directed.' Were this not so, there would be the anomaly that a defendant could be punished for attempting to do what, if accomplished, would be legal. That is, if a defendant in fact acquired a position in a relevant market that did not amount to monopoly, how could it be wrongful for a defendant to attempt, successfully or unsuccessfully, to acquire that position —i.e., to try to do that which, if accomplished, would be valid?' "

Although the issue has not been squarely presented to the District of Columbia Circuit, the Court did articulate its acceptance of the sound rationale for the rule in *Oetiker* v. *Jurid Werke, G.m.b.H.*, 556 F.2d 1, 8 (D.C. Cir. 1977):

> "The prevailing view has a number of advantages. Because of the largely fictive character of 'specific intent to monopolize,' and the general tendency of all competitive behavior to injure weaker competitors, it is often difficult to distinguish between an illegal intent to monopolize and a lawful intent to compete. A requirement that market power be shown forces the courts to consider the market setting in which the challenged behavior took place, evidence which may illuminate both the actor's intent and the anti-competitive consequences of his conduct. Such a requirement also tends to limit the application of the Sherman Act to those situations in which the potential harm from an anti-competitive practice is greatest and to those already powerful companies which have the least need for a broad range of competitive tactics."

Modification of the existing rule, as proposed by the Petitioner, would have the negative effect of suppressing legitimate competition. The law was enacted to foster, not frustrate, competition.

Because of the overwhelming legal authority contrary to its position, the Petitioner relies upon several law review articles, in arguing that the settled standards in attempt cases should be changed. A number of these articles antedate the cases above cited (footnote 4) by the Respondent. These articles, and the arguments advanced therein, were specifically referred to by the Circuit Courts when considering the standards for attempted monopolization under Section 2, and were found unpersuasive. See, *e.g.*, *Oetiker* v. *Jurid Werke, G.m.b.H.*, 556 F.2d at 7, n. 15 and 16 (D.C. Cir. 1977), and the opinion below, 575 F.2d at 276, n. 69; App. 53, n. 69. The law reviews also contain articles on this issue by respected scholars who support the present standard. See, *e.g.*, Hibner, "Attempts to Monopolize: A concept in search of analysis," 34 Antitrust L.J. 165 (1967); Hawk, "Attempts to Monopolize—Specific Intent as Antitrust's Ghost in the Machine," 58 Cornell L. Rev. 1121, 1154-5 (1973).

In any event, even if it were assumed that there is a genuine conflict among the circuits (which we submit, there

is not), and further assuming that the reasons for the accepted standard were subject to question, this Court should not grant the Petition for certiorari in this case, but should instead await a meritorious case in order to properly evaluate the challenged standard.

The case presented by the Petitioner was utterly without merit, and the grant of certiorari by this Court would only result in affirmance. Several factors buttress this conclusion.

First, due to the general verdict, the Circuit Court assumed that Beckman was found liable both of monopolization and of attempt to monopolize under §2. Second, the Circuit Court assumed, for the purposes of its decision, Spectrofuge's narrow definition of a relevant market, (575 F.2d at 284; App. 71) even though the record established that Spectrofuge was hardly certain of what geographical market it was asserting (575 F.2d at 27; App. 55-56). Even with that benefit, Spectrofuge could not introduce any evidence to demonstrate that Beckman had, in this narrowly construed and confined market, either the monopoly power or the market control to pose a dangerous probability of succeeding in the alleged attempted monopolization. In fact, as specifically determined by the Court of Appeals, the evidence offered by Spectrofuge established that *Spectrofuge itself may have enjoyed market domination in the geographic area in which the parties directly competed for contracts.* 575 F.2d at 284, n. 89, 286, n. 94; App. 72, n. 89, App. 76, n. 94). Because of this total lack of proof, the Circuit Court denounced the plaintiff's allegations as without merit and bordering on the frivolous.

This is not a proper case for this court to reanalyze long-standing antitrust principles. The peculiar and obscure facts affect only the parties involved as opposed to

any substantial element of commerce. For example, scientific instrument manufacturers such as Beckman are interested only in servicing instruments which they have sold, as the capacity to provide service for an instrument is considered an inducement to the sale. Beckman, as the Court found, is not interested in servicing instruments of other manufacturers (575 F.2d at 277; App. 56). In fact, service is, at best, a "break even" proposition (575 F.2d at 279; App. 59). There is hardly an economic inducement to Beckman, or other manufacturers, to monopolize an unprofitable market.

Furthermore, the only competitors for service contracts in the alleged relevant market, as defined by Spectrofuge, are the parties. Spectrofuge admitted its competitive posture was predicated on how many qualified service personnel it was able to lure away from manufacturers, i.e., Beckman (575 F.2d at 281; App. 63-64). In addition, the amount of money involved in the total volume of service contracts in the alleged relevant market—$85,000 for Beckman and $70,000 for Spectrofuge—is indicative of the exclusive, limited nature of this particular aspect of a much broader (yet still confined) business: the sale of sophisticated scientific equipment.

It must be concluded that this is a case limited to its peculiar facts which is absolutely void of *any* evidence of monopoly power by Beckman, and therefore does not present this Court with a suitable opportunity to analyze basic antitrust principles.

B. Certiorari is not warranted to review the holding that Respondent's replacement drive policy was the result of unilateral rather than concerted action in view of Petitioner's failure to challenge the Court of Appeals' finding that this policy did not constitute an unreasonable restraint of trade under Section 1 of the Sherman Act.

The Court of Appeals properly held that:

> "Essential to every §1 offense is concert of action between separate business entities. It is axiomatic that unilateral activity by a single firm cannot be reached via this section." 575 F.2d at 286; App. 76.

The allegedly anticompetitive conduct of Beckman, relied upon by Spectrofuge to support its claim under Section 1, had three elements: (i) an alleged intentional delay in parts shipments; (ii) an alleged wrongful credit hold; and (iii) Beckman's proration policy with respect to the price charged for an ultracentrifuge replacement drive. Concerning the first two allegations of unlawful conduct (parts delays and credit hold) the Court held, and the Petitioner does not challenge, that, ". . . both courses of action were undertaken solely by Beckman. We cannot imagine more classic examples of unilateral conduct." (575 F.2d at 287; App. 78).

The Court similarly held, as to the drive proration policy:

> "We have combed the Beckman service contracts in evidence and there is not one word in them relating to the drive proration policy. And the record is totally barren of any contract, combination or agreement, express or implied, between Beckman and Beckman instrument owners to—as plaintiff would have it—'put Spectrofuge out of business.' These policies were established unilaterally, and even with Procrustean efforts, there is no way to connect them with Beckman instrument or UC customers within the meaning of §1." 575 F.2d at 288; App. 80-81.

The Petitioner claims the Court of Appeals holding that the drive proration policy was unilateral within the meaning of Section 1 was based upon an erroneous premise of law. What the Petitioner fails to point out and does not challenge, is that the Court of Appeals not only held that the policy was unilateral, but also further expressly held, based upon its review of all of the evidence, that the Beckman proration policy was reasonable. (575 F.2d at 288; n. 98; App. 80, n. 98). Thus, even if this Court were to disagree with the Court of Appeals as to the unilateral nature of the proration policy, the result would not be different, as only unreasonable restraints of trade are proscribed by the Act.

In an attempt to overcome this insuperable difficulty, Petitioner seeks to revive its lost allegation that somehow the Beckman drive policy involves a tie-in. The Petitioner recognizes (Pet., p. 12, n. 6) that the District Court directed a verdict against its tie-in allegation, and that it failed to appeal from that ruling. This forecloses the issue. (575 F.2d at 267, n. 35; App. 29, n. 35). The Court of Appeals further made clear that even if an appeal had been taken on this issue it would have suffered the same fate. (575 F.2d at 288, n. 97; App. 80, n. 97.) There was no tie-in involved.[5]

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[5] Petitioner resorts to a total misstatement of fact when it claims in the Petition that "the customer could not have the instruments serviced by anyone else." (Pet., p. 12, n. 6). The Court of Appeals correctly held that: "There was absolutely no requirement imposed by Beckman that a customer had to employ its services, and Beckman parts were available to anyone, irrespective of who serviced the instruments." (575 F.2d at 288, n. 97; App. 80, n. 97).

Moreover, even if the issue of unilateral action were outcome determinative, it is plain that the Court of Appeals was correct when it found that the "collaborative element" (575 F.2d at 287; App. 77) was totally lacking from the Spectrofuge proof. As this Court made clear in *United States* v. *Parke, Davis and Company,* 362 U.S. 29, 46-47 (1960), the individual acquiescence of a customer with a vendor's policy based upon individual free choice, without more, does not create the concerted activity required under Section 1. The Petitioner's reference to *United States* v. *Arnold, Schwinn & Co.,* 388 U.S. 365 (1967), involving a finding of *per se* violation based upon territorial restraints imposed upon distributors after a sale, is totally inapposite. Neither the *Schwinn* analysis, nor its reconsideration and reversal in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.,* ..... U.S. ....., 97 S.Ct. 2549 (1977), have any relation to the facts in the present case. Beckman service customers are ultimate consumers, and the record is devoid of any evidence of "contract, combination or conspiracy" with these consumers within the contemplation of Section 1. The Court of Appeals reference to lack of gain (575 F.2d at 289; App. 84) emphasizes that no combination or conspiracy with ultimate consumers, with the attendant liabilities of co-conspirators, arises from these facts. *Advance Business Systems* v. *SCM Corporation,* 287 F.Supp. 143, 154 n. 20 (D. Md. 1968); aff'd., 415 F.2d 55 (4th Cir. 1969), *cert. den.* 397 U.S. 920 (1970). The cases claimed by the Petitioner to be contrary,[6] do not involve ultimate consumers but rather policies enforced in connection with franchisees and wholesalers.

[6] *Warriner Hermetics Inc.* v. *Copeland Refrig. Corp.,* 463 F.2d 1002 (5th Cir. 1972), *cert. den.,* 409 U.S. 1086 (1972); *Response of Carolina, Inc.* v. *Leasco Response Inc.,* 537 F.2d 1307 (5th Cir. 1976).

Finally, it must be noted, as did the Court of Appeals, that:

> "If three parts delays, unilateral pricing policies, and three week credit holds were the stuff of which antitrust violations were made, federal courts would undoubtedly have little time left for more pressing problems." (575 F.2d at 290, n. 101; App. 86, n. 101.)

This Court should be mindful of the time and resources expended in the conduct of an antitrust case. This "meritless matter," characterized by a total failure of proof and obscure alleged antitrust theories, does not warrant review. Such essentially "frivolous" claims should be discouraged.

CONCLUSION

For the reasons above stated, the Petition for Certiorari should be denied.

Respectfully submitted,

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